

EXHIBIT C

In The Matter Of:
Newell Rubbermaid, Inc. vs.
Kirsch Lofts, LLC

Mark A. Westra
June 17, 2016



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<p style="text-align: center;">THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION</p> <p>NEWELL RUBBERMAID, INC., Plaintiff, vs. KIRSCH LOFTS, LLC, Defendant.</p> <hr/> <p>The Deposition of MARK A. WESTRA, Taken at 99 Monroe Avenue, N.W., Grand Rapids, Michigan, Commencing at 8:57 a.m., Friday, June 17, 2016, Before Peggy S. Savage, CSR-4189, RPR.</p>	<p>Page 1</p> <p>1 TABLE OF CONTENTS 2 Witness Page 3 MARK A. WESTRA 4 5 EXAMINATION 6 BY MR. RODRIGUEZ: 4 7 8 EXHIBITS 9 Exhibit Page 10 (Exhibit attached to transcript.) 11 12 DEPOSITION EXHIBIT 1 11 13 DEPOSITION EXHIBIT 2 34 14 DEPOSITION EXHIBIT 3 41 15 DEPOSITION EXHIBIT 4 58 16 DEPOSITION EXHIBIT 5 62 17 DEPOSITION EXHIBIT 6 66 18 DEPOSITION EXHIBIT 7 85 19 DEPOSITION EXHIBIT 8 87 20 DEPOSITION EXHIBIT 9 91 21 22 23 24 25</p> <p>Page 2</p> <p>1 APPEARANCES: 2 3 DENNIS W. BILA, II 4 Bila & Associates, P.L.L.C. 5 4270 Cottontail Lane 6 Harbor Springs, Michigan 49740 7 (231) 838-5678 8 bila@bilalaw.com 9 Appearing on behalf of the Plaintiff.</p> <p>10 11 GABRIEL M. RODRIGUEZ 12 Schiff Hardin, L.L.P. 13 233 S. Wacker Drive 14 Suite 6600 15 Chicago, Illinois 60606 16 (917) 224-0028 17 grodriguez@schiffhardin.com 18 Appearing on behalf of the Defendant.</p> <p>19 20 ALSO PRESENT: 21 Carl Gabriesle 22 Scott Bosgraaf 23 24 25</p>	<p>Page 3</p> <p>1 Grand Rapids, Michigan 2 Friday, June 17, 2016 3 8:57 a.m. 4 5 MARK A. WESTRA, 6 was thereupon called as a witness herein, and after 7 having first been duly sworn or affirmed to testify to 8 the truth, the whole truth and nothing but the truth, 9 was examined and testified as follows:</p> <p>10 EXAMINATION 11 BY MR. RODRIGUEZ: 12 Q. Good morning, Mr. Westra. We just met before we went 13 on the record. My name is Gabe Rodriguez. I'm the 14 attorney for Newell brands in this case. 15 A. Nice to meet you, Gabe. 16 Q. Before we get started, I just want -- you've been 17 deposed before; is that correct? 18 A. I have. 19 Q. How many times? 20 A. Several. 21 Q. More than five? 22 A. Probably five to ten. 23 Q. Okay. And have you testified at trial? 24 A. Yes. 25 Q. Okay. So you know the ground rules of a deposition?</p>
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<p>1 been done. The leach study is the only 2 activity here that you've said or caused a 3 delay in the implementation of the soil 4 remedy; is that right?"</p> <p>5 MR. BILA: Same objection. You still can 6 answer.</p> <p>7 THE WITNESS: As I said, the only thing 8 that has been accomplished is the leach study in the 9 multiple investigation reports over the last several 10 years.</p> <p>11 BY MR. RODRIGUEZ:</p> <p>12 Q. And what was the cause of the delay?</p> <p>13 MR. BILA: Same objection. Go ahead. You 14 can say it again.</p> <p>15 THE WITNESS: The cause of the delay 16 appears to be the fact that the leach study, while 17 first attempting, and in my opinion attempted, in a 18 poorly-designed manner.</p> <p>19 BY MR. RODRIGUEZ:</p> <p>20 Q. Which resulted in the delay?</p> <p>21 MR. BILA: Objection.</p> <p>22 THE WITNESS: Which resulted in a delay.</p> <p>23 BY MR. RODRIGUEZ:</p> <p>24 Q. Are there other things that URS or Newell has done 25 that has caused the delay?</p>	<p>Page 53</p> <p>1 them to approve. 2 Q. Okay. Well, we'll get to that. Let's turn to your 3 involvement with the site when you first became 4 involved with the site. You were initially retained 5 by Kirsch Lofts to do due diligence on the property; 6 is that right?</p> <p>7 A. Correct. 8 Q. And you did -- well, tell me when is it that you were 9 retained by Kirsch Lofts.</p> <p>10 A. I don't recall exactly, but the reference material 11 should have -- we issued Phase I assessments and 12 baseline environmental assessments in July and 13 September of 2009. So I would say anywhere from mid 14 to late 2008 through spring of 2009 would have been 15 our first involvement.</p> <p>16 Q. And you were brought in to replace another firm?</p> <p>17 A. Supplement or replace, yes. 18 Q. Okay. That was ERE? 19 A. Yes. 20 Q. They had done a Phase I and a Phase II for the Kirsch 21 Lofts for this project? 22 A. Yes. 23 Q. Do you know why you were brought in? 24 A. I can speculate, but I don't think I was ever told 25 why.</p>
<p>Page 54</p> <p>1 MR. BILA: Go ahead. It's asked and 2 answered, but you can say it again.</p> <p>3 THE WITNESS: As I said, I believe the mere 4 fact the study was performed delayed remediation. The 5 fact that it was poorly designed delayed its 6 submission, its final result. And the fact that it 7 was poorly interpreted further delayed its result. 8 And I don't know how many other ways I can say it.</p> <p>9 BY MR. RODRIGUEZ:</p> <p>10 Q. Okay. A minute ago you said that other things could 11 have been done simultaneous with the leach study; is 12 that right?</p> <p>13 A. Yes.</p> <p>14 Q. Could you tell me what those things could have been -- 15 that could have been done?</p> <p>16 A. Certainly, the proposed hot spot and soil removal and 17 excavation could have been done. The air sparge/SVE 18 system could have been designed, installed, and been 19 in several years of operation, maybe even nearing 20 either the current ROD objections or some alternate 21 proposed criteria if, in fact, the leach study and 22 submission is approved by MDEQ and EPA.</p> <p>23 Q. At this point, however, MDEQ hasn't approved or 24 allowed any work to be done on that, have they?</p> <p>25 A. I'm not aware that anybody's proposed any work for</p>	<p>Page 56</p> <p>1 Q. Why do you think you were brought in? 2 A. Because we'd done other due diligence projects for 3 affiliates for Kirsch Lofts, LLC. And, personally, I 4 believe we can do it better than ERE or our 5 competition, quite frankly.</p> <p>6 Q. And do you recall what the scope of services you were 7 asked to do after you first were retained?</p> <p>8 A. We did prepurchase due diligence with the Phase I 9 assessment, we did post-purchase baseline 10 environmental assessment, and we also did Brownfield 11 consultation.</p> <p>12 Q. Okay. And one of the first things you would have done 13 was reviewed the Phase I and Phase II that ERE had 14 done?</p> <p>15 A. Yes.</p> <p>16 Q. And do you recall whether -- the conclusions of those 17 reports?</p> <p>18 A. I don't. Basically, ERE stated the obvious, as we 19 did, that the site is part of an NPL site and, 20 therefore, contamination is known or likely to be 21 present.</p> <p>22 Q. Okay. Do you recall any other -- those are recognized 23 environmental conditions, right?</p> <p>24 A. Correct.</p> <p>25 Q. Which means what?</p>

<p style="text-align: right;">Page 57</p> <p>1 A. Means, paraphrasing, the presence or likely presence 2 of hazardous substances and petroleum products 3 effectively in concentrations that may pose a threat 4 to human health or the environment.</p> <p>5 Q. So I think there's a sentence in there that says de 6 minimis conditions are not recognized environmental 7 conditions; is that right?</p> <p>8 A. Correct.</p> <p>9 Q. Okay. And you said that there was -- that the ERE 10 Phase I identified that it was an NPL site?</p> <p>11 A. Correct.</p> <p>12 Q. And there was a history of industrial processes on the 13 site?</p> <p>14 A. Yes.</p> <p>15 Q. And that there was a history of use of TCE on -- on 16 the property?</p> <p>17 A. Yes.</p> <p>18 Q. And that TCE was the principal contaminant of concern 19 at the NPL site?</p> <p>20 A. I don't know whether they made that conclusion or not.</p> <p>21 Q. Okay. Fair enough. The Phase I recommended a Phase 22 II?</p> <p>23 A. They may -- they either recommended or they did one. 24 I'm not sure if the text of the Phase I recommended a 25 Phase II or not.</p>	<p style="text-align: right;">Page 59</p> <p>1 Q. Okay. And it's -- it's not the entire report, 2 although I have it if you need it.</p> <p>3 A. It is not. It is a table summarizing portions of the 4 soil test results and a figure showing where samples 5 were collected relative to the buildings and property 6 line.</p> <p>7 Q. Okay. So just looking at this Table 3 of Exhibit -- 8 you said it was 4, right?</p> <p>9 A. 4.</p> <p>10 Q. Can you -- can you tell me how many samples were 11 analyzed by ERE for TCE in their Phase II 12 investigation?</p> <p>13 A. Six samples are reported on Table 3.</p> <p>14 Q. And how many of those samples detected TCE?</p> <p>15 A. Four.</p> <p>16 Q. And how many of those detections were over the 100 17 part per billion cleanup level?</p> <p>18 A. All four.</p> <p>19 Q. And can you -- and how many of those are -- two of 20 those -- well, why don't you tell me which soil 21 borings samples exceeded.</p> <p>22 A. SB-2, SB-9, SB-10, and SB-11.</p> <p>23 Q. And the values at SB, can you -- can you also give me 24 the values reported there?</p> <p>25 A. In order, 160, 1,000, 2,800, and 14,000 micrograms per</p>
<p style="text-align: right;">Page 58</p> <p>1 Q. Okay. But they did do a Phase II?</p> <p>2 A. Yes.</p> <p>3 Q. And you're familiar with that Phase II?</p> <p>4 A. I am.</p> <p>5 Q. You reviewed it?</p> <p>6 A. I reviewed it, used the information from it during our 7 due diligence and baseline assessment, yes.</p> <p>8 Q. Okay. I want to show you the pieces of that.</p> <p>9 MARKED FOR IDENTIFICATION</p> <p>10 DEPOSITION EXHIBIT 4</p> <p>11 10:30 a.m.</p> <p>12 MR. BILA: Can we take a quick break?</p> <p>13 THE WITNESS: We're off the record?</p> <p>14 MR. RODRIGUEZ: Yeah.</p> <p>15 (Back on the record at 10:31 a.m.)</p> <p>16 (Back on the record at 10:41 a.m.)</p> <p>17 BY MR. RODRIGUEZ:</p> <p>18 Q. I'm going to show you what I've marked as Westra 19 Number 4. And I'm showing you, asking you, do you 20 recognize Westra 4?</p> <p>21 A. Yes.</p> <p>22 Q. What is it?</p> <p>23 A. It's the Phase II assessment that Equity Resource 24 Environmental, ERE, performed for the property in 25 2008.</p>	<p style="text-align: right;">Page 60</p> <p>1 kilogram.</p> <p>2 Q. Okay. And can you -- can you then turn to the figure.</p> <p>3 And while -- while looking at the table, can you just 4 find on the figure where those soil borings were and 5 just circle the borings?</p> <p>6 MR. RODRIGUEZ: And for the record, he's 7 circling with a pen. Okay. Thank you.</p> <p>8 THE WITNESS: Today is the 15th?</p> <p>9 COURT REPORTER: 17th.</p> <p>10 MR. RODRIGUEZ: And for the record, you've 11 dated and initialed the exhibit.</p> <p>12 BY MR. RODRIGUEZ:</p> <p>13 Q. That soil sampling -- those soil sampling results have 14 not delineated the extent of contamination; is that 15 right?</p> <p>16 A. Correct.</p> <p>17 Q. And one of the conclusions of this report was that a 18 baseline environmental assessment should be performed; 19 is that right?</p> <p>20 A. I don't recall, but I -- if I had been drafting it, 21 that would have been a recommendation but would not 22 have been presented in the report.</p> <p>23 Q. Okay. If I showed you a report, would that refresh 24 your recollection?</p> <p>25 A. Sure.</p>

<p>Page 61</p> <p>1 Q. I'm not going to mark this. I'm not going to have 2 you -- if you look at that and see if that refreshes 3 your recollection of what the recommendation was.</p> <p>4 A. On page 9 of 12, second full paragraph, therefore, ERE 5 recommends a baseline environmental assessment (BREA) 6 be completed for the subject property to address 7 liability issues associated with the potential future 8 purchases and/or operation of a known facility.</p> <p>9 Q. Thank you. What's the date of that report?</p> <p>10 A. September 2nd, 2008.</p> <p>11 Q. Thanks. And so you were retained sometime after they 12 completed that report; is that right?</p> <p>13 A. Yes.</p> <p>14 Q. So can you tell me what you did when you were first 15 retained? What was the first task that you did?</p> <p>16 A. I don't recall specifically, but normally it would be 17 to read pre-existing documents, the Phase I, Phase II, 18 and potentially supporting documents.</p> <p>19 Q. And in this project, you -- you said you did a Phase I 20 of your own?</p> <p>21 A. Yes.</p> <p>22 Q. You did a BEA?</p> <p>23 A. We did.</p> <p>24 Q. And you did soil testing?</p> <p>25 A. We did do soil testing.</p>	<p>Page 63</p> <p>1 which presents soil boring locations relative to the 2 buildings and property lines.</p> <p>3 Q. Can you tell from the exhibit when you collected the 4 soil data?</p> <p>5 A. Yes.</p> <p>6 Q. And how do you determine that?</p> <p>7 A. In each column where soil tests results are presented, 8 third row down is sampling date.</p> <p>9 Q. And the date that this testing was done, this sampling 10 event, was what?</p> <p>11 A. November 6, 2008.</p> <p>12 Q. So this would have been a couple of months, give or 13 take, after the ERE Phase II?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. And can you -- can you tell me how many 16 samples -- during this event -- how many samples were 17 analyzed for TCE?</p> <p>18 A. Ten.</p> <p>19 Q. And of those ten, how many detected TCE?</p> <p>20 A. Eight. Correct that. Nine detected values for TCE.</p> <p>21 Q. And how many exceeded the Superfund cleanup level of 22 100 ppb?</p> <p>23 A. Seven.</p> <p>24 Q. Okay. And how many of these exceeded the standard by 25 at least a factor of ten?</p>
<p>Page 62</p> <p>1 Q. You did more than one testing of that; is that right?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. Do you remember when the first testing of that 4 took place?</p> <p>5 A. I don't without referring to our tables --</p> <p>6 Q. All right.</p> <p>7 A. -- a report.</p> <p>8 Q. Okay. Let me show you what I'm going to mark as 9 Westra 5.</p> <p>10 MARKED FOR IDENTIFICATION</p> <p>11 DEPOSITION EXHIBIT 5</p> <p>12 10:49 a.m.</p> <p>13 BY MR. RODRIGUEZ:</p> <p>14 Q. Why don't you take a look at Westra 5. And can you 15 tell me whether you recognize Exhibit 5?</p> <p>16 A. It appears to be an excerpt from our baseline 17 environmental assessment performed in 2009.</p> <p>18 Q. And that's a -- that's a group exhibit; is that right?</p> <p>19 A. I'm sorry?</p> <p>20 Q. There are a number of pages to it?</p> <p>21 A. Yes.</p> <p>22 Q. Can you identify each of them, each page on that?</p> <p>23 A. Pages 1 and 2 is a table summarizing soil test 24 results, page 3 is explanatory to the soil test 25 results summary, and the fourth page is our Figure 1,</p>	<p>Page 64</p> <p>1 A. Six.</p> <p>2 Q. Now, there's a figure in there, as well; isn't that 3 right?</p> <p>4 A. Yes. Page 4.</p> <p>5 Q. Can you -- like you did with the ERE, can you just go 6 through and circle each of the locations that had 7 exceedances of TCE?</p> <p>8 The -- the testing that you did in November 9 of 2008, did that fully delineate the extent --</p> <p>10 lateral and vertical extent of the contamination at 11 the site?</p> <p>12 A. No. It was not designed to.</p> <p>13 Q. Okay. Now, these -- this data and this figure were 14 included as an appendix to your Phase I report; is 15 that right?</p> <p>16 A. I doubt it would have been in the Phase I report, but 17 these are -- similar tables and figures would have 18 been in the baseline assessment.</p> <p>19 Q. Okay.</p> <p>20 A. It could have been in the Phase I, but it more likely 21 would be in the baseline assessment.</p> <p>22 Q. Okay. And I'm just going to show you this so you can 23 refresh your memory. We won't -- we won't necessarily 24 mark this. Would looking at your Phase I help you 25 remember whether it was included in the Phase I? That</p>

<p style="text-align: right;">Page 65</p> <p>1 is your Phase I report, isn't it?</p> <p>2 A. It appears to be, yes. Table 1 appears to come from</p> <p>3 Appendix J -- or it would be a portion of Appendix J,</p> <p>4 Phase I report.</p> <p>5 Q. So the data was presented in the Phase I --</p> <p>6 A. Yes.</p> <p>7 Q. -- is that right?</p> <p>8 And the Phase I report was dated July 10,</p> <p>9 2009?</p> <p>10 A. Yes.</p> <p>11 Q. And -- and that was the day that the Kirsch Lofts</p> <p>12 closed on the property; is that right?</p> <p>13 A. I don't know.</p> <p>14 Q. Okay. You did do additional testing after this Phase</p> <p>15 I; is that right?</p> <p>16 A. I believe so, yes.</p> <p>17 Q. And that additional testing, the purpose of that</p> <p>18 additional testing was what?</p> <p>19 A. I don't recall.</p> <p>20 Q. Okay. Do you remember when you did it?</p> <p>21 A. Not without referring to the documents, no.</p> <p>22 Q. Do you recall whether it was done -- it was done after</p> <p>23 the Phase I report was prepared?</p> <p>24 A. I believe so, yes.</p> <p>25 Q. Okay.</p>	<p style="text-align: right;">Page 67</p> <p>1 Q. Would have submitted it to the State?</p> <p>2 A. Correct.</p> <p>3 Q. Okay. The BEA, can you explain to me what the purpose</p> <p>4 of this document is?</p> <p>5 A. The purpose of the BEA is to obtain cleanup liability</p> <p>6 protection under Michigan law analogous to the bona</p> <p>7 fide prospective purchaser exemption under federal</p> <p>8 law.</p> <p>9 Q. And is that the -- is that its sole purpose?</p> <p>10 A. From a legal perspective, I believe it is, yes.</p> <p>11 Q. What other perspective would you --</p> <p>12 A. From a technical perspective, it doesn't include</p> <p>13 required information, summary of test results, as well</p> <p>14 as the Phase I assessment.</p> <p>15 Q. Required information, required for what?</p> <p>16 A. For -- required at the time by rule by the agency to</p> <p>17 be included in the baseline -- as the baseline</p> <p>18 environmental assessment.</p> <p>19 Q. And this rule was a rule for the liability protection?</p> <p>20 A. It was a rule -- yes. It was a rule defining the</p> <p>21 contents of the BEA for liability protection.</p> <p>22 Q. Apart from liability protection, is there any other</p> <p>23 purpose for a baseline environmental -- this baseline</p> <p>24 environmental assessment?</p> <p>25 A. It may be used for other purposes, but it wouldn't be</p>
<p style="text-align: right;">Page 66</p> <p>1 A. Are we done with 5?</p> <p>2 Q. Yeah.</p> <p>3 MARKED FOR IDENTIFICATION</p> <p>4 DEPOSITION EXHIBIT 6</p> <p>5 10:59 a.m.</p> <p>6 BY MR. RODRIGUEZ:</p> <p>7 Q. I'm going to show you what's been marked as Westra 6.</p> <p>8 And can you tell me what Westra 6 is?</p> <p>9 A. It is an excerpt from our September 4th, 2009 baseline</p> <p>10 environmental assessment, appears to be a DEQ district</p> <p>11 office copy.</p> <p>12 Q. Okay. And do you see there the date that the DEQ</p> <p>13 received it?</p> <p>14 A. October 28th, 2009.</p> <p>15 Q. And the report says that it was prepared on September</p> <p>16 4th?</p> <p>17 A. Yes.</p> <p>18 Q. Are you -- do you know why it was -- there was such a</p> <p>19 lag between the preparation of this report and its</p> <p>20 submission to the State?</p> <p>21 A. I don't know for this example, but I can tell you it's</p> <p>22 very common to be several weeks or months between</p> <p>23 completing the document and submission to the agency.</p> <p>24 Q. Okay. And were you the one that submitted it?</p> <p>25 A. It would have been our office that submitted it.</p>	<p style="text-align: right;">Page 68</p> <p>1 created for other purposes.</p> <p>2 Q. Okay. And so if you just open it up and turn to page</p> <p>3 2. So if -- if you go down there, third paragraph</p> <p>4 down in that introduction, I think you're summarizing</p> <p>5 here, in this introduction, the findings of your -- on</p> <p>6 this baseline environmental assessment. It basically</p> <p>7 says here that the property was -- was part of the</p> <p>8 former Kirsch plant, right?</p> <p>9 A. Yes.</p> <p>10 Q. And it also concludes, in that last sentence of that</p> <p>11 third paragraph, the soil and groundwater</p> <p>12 contamination associated with these historical</p> <p>13 operations is well documented?</p> <p>14 A. Correct.</p> <p>15 Q. And that would have been referring to the ERE results</p> <p>16 as well as the November 2008 results that you had</p> <p>17 done?</p> <p>18 A. And I believe even some prior testing that had been</p> <p>19 done several years before that.</p> <p>20 Q. Okay. And what is that testing?</p> <p>21 A. A State contractor, SEG, did at least one boring, I</p> <p>22 believe, way back in the '90s that found TCE and PCE.</p> <p>23 Q. Is that referenced anywhere in your report?</p> <p>24 A. I'm not sure.</p> <p>25 Q. Let me direct your attention to the last paragraph of</p>

<p style="text-align: right;">Page 69</p> <p>1 the introduction.</p> <p>2 A. Okay.</p> <p>3 Q. Can you read that?</p> <p>4 A. Collection and analysis of soil samples from the 5 property confirmed releases of hazardous substances 6 associated with the historical uses of the property. 7 The results of the sampling and chemical analysis 8 confirmed the property is a "Facility," as defined by 9 Part 201 of NREPA, as amended.</p> <p>10 Q. And that's the principal conclusion of this document;</p> <p>11 is that right?</p> <p>12 A. I--</p> <p>13 Q. Let me rephrase. You had mentioned a minute ago that</p> <p>14 liability protection is probably the -- the reason</p> <p>15 that this BEA is created; is that right?</p> <p>16 A. Correct.</p> <p>17 Q. And is this conclusion, this last sentence of the</p> <p>18 introduction, is that relevant -- how is that relevant</p> <p>19 to that purpose?</p> <p>20 A. A BEA only provides liability protections for 21 properties that meet the definition of facility under 22 Part 201.</p> <p>23 Q. And what -- what would meet that definition?</p> <p>24 A. Properties that have hazardous substances or petroleum 25 products above Michigan's current generic residential</p>	<p style="text-align: right;">Page 71</p> <p>1 the Superfund process?</p> <p>2 A. If it was a PRP, then the agency may have required 3 further investigation, yes.</p> <p>4 Q. Would further investigation have been required for</p> <p>5 purposes of the development project?</p> <p>6 A. It may have, yes.</p> <p>7 Q. Under what circumstances would that have been</p> <p>8 required?</p> <p>9 A. To -- during redevelopment, you almost certainly have 10 to modify building infrastructure, underground 11 utilities might remove or replace or alter 12 landscaping, which would mean excavation or at least 13 movement of soil, and the continuing obligations under 14 CERCLA or due care under Part 201 may require 15 demonstrations that that be done so as not to 16 exacerbate the existing contamination.</p> <p>17 Q. That's all true if you know where the contamination is</p> <p>18 located; isn't that right?</p> <p>19 A. The requirements are there whether you know where -- 20 as long as you know contamination is present, you have 21 your continuing obligations and due care requirements.</p> <p>22 Q. But it would -- but you would need to do additional</p> <p>23 testing just to know if you had any other exposure</p> <p>24 areas; isn't that correct?</p> <p>25 A. That would be site specific.</p>
<p style="text-align: right;">Page 70</p> <p>1 cleanup criteria.</p> <p>2 Q. And -- and the BEA, the soil results that were</p> <p>3 reported in the BEA, would have established that this</p> <p>4 property meet the definition of a facility under State</p> <p>5 law?</p> <p>6 A. Correct. That was identified in the previous exhibit.</p> <p>7 Q. That that testing that we looked at --</p> <p>8 A. Correct.</p> <p>9 Q. -- would have established that this was a facility?</p> <p>10 A. Right. Exhibit -- testing summarized on Exhibit -- 11 did we mark the ERE? Exhibits 4 and 5.</p> <p>12 Q. Okay. So at the time you prepared this document, the</p> <p>13 testing you had done and that had been done by ERE had</p> <p>14 confirmed that this facility qualified -- that this</p> <p>15 property qualified as a facility under the B- -- under</p> <p>16 Michigan law?</p> <p>17 A. Correct.</p> <p>18 Q. Okay. At that time, however, you had not fully</p> <p>19 delineated the extent of contamination; is that right?</p> <p>20 A. That's correct, we hadn't attempted to.</p> <p>21 Q. Okay. And the -- so at the time that -- that this</p> <p>22 report was submitted, additional investigation was</p> <p>23 going to be needed; is that correct?</p> <p>24 A. It wouldn't have been needed for liability protection.</p> <p>25 Q. Would additional investigation have been required for</p>	<p style="text-align: right;">Page 72</p> <p>1 Q. I'm talking about this site.</p> <p>2 A. And you may. It would depend on the location of your 3 activities relative to what you already know is 4 contaminated.</p> <p>5 Q. At the point that you submitted this report, you</p> <p>6 didn't know whether there was substantial</p> <p>7 contamination on other parts of the facility that</p> <p>8 might require additional work by the developer, did</p> <p>9 you?</p> <p>10 A. I'm not sure whether we would have had the development 11 plan, which would have been the second component of 12 that analysis or not. One component is obviously what 13 you know. The other component is what you need to 14 know, which would be based on your development plan.</p> <p>15 Q. Um-hum. At the time, though, that you prepared this,</p> <p>16 you didn't know the answer to the question of how much</p> <p>17 additional contamination there was on the site?</p> <p>18 A. No.</p> <p>19 Q. Or whether there was any potential exposure to</p> <p>20 users that would -- people that would be on the</p> <p>21 property after the development project was completed?</p> <p>22 A. We would know there would be potential exposure. We 23 wouldn't necessarily know if there would be actual 24 exposure.</p> <p>25 Q. Well, until you know where the contamination is</p>

<p style="text-align: right;">Page 73</p> <p>1 located, you can't really answer any of those 2 questions, can you? 3 A. Of course. 4 Q. So there would have been additional investigation that 5 would have been necessary for purposes of the 6 development project; isn't that right? 7 A. Again, I'm going to go back to the same statement. 8 You would evaluate the information that you have 9 versus the information you need relative to the 10 proposed development. If you're doing nothing with 11 the building and you're not going to disturb any of 12 the soil, you may have the answer to that question 13 with the information in a BEA or you may not. 14 Q. In this BEA, did you have enough information to 15 conclude that you didn't need any more investigation 16 for purposes of the development? 17 A. I don't know. I'd have to go back in time, so I don't 18 know. 19 Q. Well, you -- you have not delineated the lateral 20 extent of contamination with the testing that you had 21 done as of July 10, 2009, when you completed the 22 Phase I report; is that right? 23 A. Yes. 24 Q. So -- and you had not completed vertical extent -- 25 delineated the vertical extent of the contamination on</p>	<p style="text-align: right;">Page 75</p> <p>1 the additional testing would not have presented a risk 2 to him or his project? Or the lack of information, 3 rather. 4 A. Again, he would only need to know the horizontal and 5 vertical extent of contamination such that it would be 6 necessary to assess potential or actual exposures 7 either during construction or, you know, during reuse 8 of the -- final reuse of the development. 9 Q. Leaching to groundwater is the principal exposure risk 10 that was in play at this time for the Superfund site; 11 isn't that right? 12 A. It is the most stringent of the ROD-required cleanup 13 goals, but it is irrelevant to redevelopment. 14 Q. But it is driving the remedy of the Superfund site? 15 A. It's part of what would be driving the remedy, yes. 16 Q. Well, it's the cleanup objective that is being used is 17 the migration of groundwater components to the soil 18 cleanup? 19 A. For the TCE and the PCE, that's correct. 20 Q. So at the time then that -- while you didn't know the 21 conditions at depth, there was -- you did know that 22 there was a Superfund process going on -- 23 A. Yes. 24 Q. -- isn't that correct? 25 And you had reviewed the ROD and amended</p>
<p style="text-align: right;">Page 74</p> <p>1 the site; isn't that right? 2 A. That's correct. 3 Q. So that beginning develop- -- so you -- beginning 4 development on the report without knowing that there 5 was -- whether there was additional contamination on 6 the property, is that something that the developer 7 could have done at that point? 8 A. Again, it depends on its development plan. The 9 majority of time the vertical extent of contamination 10 is meaningless to redevelopment. The horizontal 11 extent is more likely to be relevant. But, again, if 12 you're not disturbing, say, an area underneath the 13 parking lot, you may not need to know where the 14 contamination starts and stops. 15 Q. Well, the vertical extent would be meaningless if -- 16 if it weren't a federal Superfund site; is that right? 17 A. My understanding of your phrasing of your question had 18 nothing to do with whether it was a Superfund site. 19 You were asking about redevelopment. 20 Q. I'm actually asking about this site. 21 A. Again, as a non-liable party, there's no burden on a 22 re- -- a redeveloper to determine the extent of 23 contamination, unless it's required for him to meet 24 his continuing obligations or due care. 25 Q. So long as he was protecting himself from liability,</p>	<p style="text-align: right;">Page 76</p> <p>1 ROD before you prepared the Rose & Westra Phase I 2 report? 3 A. I doubt we looked at the ROD in any significant 4 detail. The ROD apparently applied to the eastern 5 property and it did set cleanup goals for both soil 6 and groundwater, but we wouldn't have spent much time 7 on the ROD. It was directed at the PRP, not the 8 redevelopment. 9 Q. So if the ROD -- so the fact that the ROD, in your 10 view, applied to the eastern parcel, that was a 11 relevant consideration in the determination as to 12 whether you really needed to do any further 13 investigation on the western parcel? 14 A. No. Again, any additional investigation on the 15 western parcel would have been driven by our 16 redevelopment information needs, not the ROD. 17 Q. Okay. So the ROD then, the fact that it was a 18 Superfund site that you were developing on, it was 19 inconsequential to the decision making as to whether 20 additional testing was going to be needed? 21 A. Inconsequential for additional testing for 22 redevelopment, that's correct. 23 Q. The discovery of the soil contamination on the western 24 parcel at near surface -- near the surface was a 25 new -- new information; wasn't it?</p>

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<p>1 A. People acted like it was, but, again, I don't know why 2 it was, because contamination had been documented by 3 the State's contractor at least a decade before. 4 Q. But the levels that were discovered by you in your due 5 diligence were considerably higher than anything that 6 was found by the SEG; isn't that right? 7 A. That's correct. 8 Q. And the lateral extent of contamination was something 9 that you -- you had not defined either by the time 10 that you prepared your Phase I? 11 A. Correct. 12 Q. Given the results that you had in hand as a result of 13 the November 2008 testing and the ERE Phase II 14 results, did you expect that DEQ might want additional 15 investigation done? 16 A. By whom? Directed at whom? 17 Q. Did they want additional -- to anyone. 18 A. I -- again, I can't speak for the agency. I wouldn't 19 try to project what the agency would ask of the 20 various parties. 21 Q. Well, you're very experienced in due diligence 22 matters. I'm trying to figure out what you would have 23 expected at that time. 24 A. I mean, I would hope, as a taxpayer of the State, that 25 they would ask the liability party or PRP to address</p>	<p>1 third, maybe fourth or fifth time, that you would look 2 at the development plan and what you would be 3 disturbing and doing for redevelopment relative to the 4 information available and then decide what, if any, 5 information is necessary to support that 6 redevelopment. 7 Q. Would it have been foreseeable that additional testing 8 might be necessary to characterize the site? 9 A. Yes. 10 Q. I'm going to ask you to look at page 10 of -- of the 11 exhibit. Can you review the second paragraph of that, 12 that's on that page? 13 A. Hmm-mmm. 14 Q. So -- and this is a conclusion that you made, at the 15 time that this document was prepared, that there was 16 the likelihood of other contamination? 17 A. That is a generic paragraph that would have been in 18 any of our BEAs prior -- including this one -- prior 19 to changing the rules, changing the content of the 20 BEAs, because it is a statement of fact. We never 21 have sampled all the property soil or groundwater on 22 the property. You cannot test for every chemical that 23 exists. Therefore, when this was a required section 24 of the BEA, statement of fact in every one that we 25 did.</p>
Page 78	Page 80
<p>1 the contamination that's part of the Superfund site. 2 Q. And at that time, wasn't there a work plan already in 3 the works for doing additional testing after closing 4 of the acquisition -- 5 A. I-- 6 Q. -- by the developer? 7 A. A work plan? There would have been -- there may have 8 been a Brownfield benefit package being created that 9 would have contained additional testing to support 10 redevelopment. 11 Q. So there was a work plan for additional testing to be 12 done after the acquisition of the property? 13 A. It would have been created at some point. I don't 14 remember the sequence. 15 Q. But there was a work plan to do additional testing 16 after the close of the acquisition? 17 A. I'm going to re-say, I do not remember the sequence it 18 would have been created or drafted at some point. 19 When, relative to the acquisition, I don't recall. 20 Q. Was that proposed or requested by the agency? 21 A. No. 22 Q. Okay. And so in your opinion, you don't know whether 23 additional investigation would have been warranted or 24 necessary from a risk management perspective? 25 A. From a redevelopment perspective, I will state for the</p>	<p>1 Q. So you're saying this was generic and it really didn't 2 have any particular meaning in this particular BEA? 3 A. It had meaning in every BEA we did and it applied to 4 this case, like others. You cannot test for every 5 compound that exists. There are not cleanup criteria 6 for every compound or element that exists, and we 7 can't test all the soil and groundwater. So no matter 8 how much testing you do, you don't have perfect 9 information. 10 Q. Now, so the -- the fact that you had the majority of 11 the samples that you had done during your due 12 diligence, had discovered elevated levels of TCE, the 13 contaminant of concern at the Superfund site, in 14 excess of a cleanup criteria, and had not fully 15 delineated the contamination on this site, you're 16 saying that you could not reasonably anticipate that 17 additional investigation was going to be required by 18 the State? 19 A. I didn't say that. I said -- you know, there would be 20 two routes that additional investigation may be 21 necessary; one is for redevelopment and one may be for 22 agency enforcement. 23 Q. And could you foresee that there would be additional 24 testing done for purposes of agency enforcement? 25 A. For both, as I just said.</p>

1 Q. There would be, in this particular case, given the 2 results that you had in hand on July 10, 2009 -- 3 A. As I -- 4 Q. -- you could reasonably foresee that there would be 5 additional testing required under the Superfund 6 process? 7 MR. BILA: Objection, form, and asked and 8 answered, but go ahead and say it once again for the 9 12th time. 10 THE WITNESS: As I said, as a taxpayer of 11 the State, I would hope the agency would enforce 12 against the liable parties. 13 BY MR. RODRIGUEZ: 14 Q. That's not the question. The question is: Could you 15 reasonably foresee that they were going to require 16 additional substantial testing based on the conditions 17 that were reported in your Phase I? 18 MR. BILA: Same objection. 19 THE WITNESS: You're asking me to put 20 myself in the mind of people that, quite frankly, I'm 21 often not good at predicting. If I had been in their 22 position, I would require additional testing, but 23 that's not what you're asking. 24 BY MR. RODRIGUEZ: 25 Q. I'm asking you whether you could have reasonably	Page 81	Page 83 1 the request -- euphemistic demand of the agency. 2 BY MR. RODRIGUEZ: 3 Q. And they would have demanded -- they would have 4 demanded additional testing? 5 MR. BILA: Objection, form. He can't 6 predict that. Go ahead. 7 THE WITNESS: As I said, if I had been in 8 their position, I would have, but I -- I do not 9 predict the agencies, because I'm wrong time and time 10 again. 11 BY MR. RODRIGUEZ: 12 Q. So you did not then advise Kirsch Lofts that there was 13 a possibility that there would be additional 14 investigation being done as a result of the findings; 15 is that right? 16 MR. BILA: Objection, form, but go ahead. 17 You can answer. 18 THE WITNESS: Possibility? I probably did, 19 but I don't -- as far as how foreseeable it would be, 20 you know, again, I wouldn't have ruled it out or said 21 it was definite. 22 BY MR. RODRIGUEZ: 23 Q. So you're saying you're not sure whether you advised 24 about the possibility of additional response 25 activities being required of the Superfund party as a
Page 82	Page 84 1 foreseen it given the conditions on the property. 2 Now, you're an expert in this area or holding yourself 3 out to be an expert in this area. I just want to know 4 whether you foresaw that additional testing was going 5 to be required of the Superfund party? 6 MR. BILA: And he's answered that a dozen 7 times. 8 MR. RODRIGUEZ: He has not answered the 9 question. 10 MR. BILA: He has. He said he can't -- we 11 can read them back. He said if it was up to me, I 12 would have required it, but it's not up to me, and I 13 can't predict what the State will do. As a taxpayer, 14 I would like them to take that next step, but I'm not 15 going to guess what the State wants. That's what he 16 said over and over. 17 BY MR. RODRIGUEZ: 18 Q. So the question -- the question still stands. Did you 19 reasonably foresee -- could you reasonably foresee 20 that additional testing was going to be required? 21 MR. BILA: Same objection. 22 THE WITNESS: And as I said, I can see two 23 routes where it could have been or would have been 24 required. One of them might be by us recommending it, 25 based on redevelopment plans. The other would be at	Page 82

1 remediation that might be required. 2 MR. BILA: By whom? Objection, form. 3 THE WITNESS: Would you restate the 4 question, please? 5 BY MR. RODRIGUEZ: 6 Q. In your experience as a due diligence professional, 7 would you say that the presence of TCE at levels 8 exceeding ten times the applicable cleanup objective 9 at a Superfund site, and that has not been fully 10 delineated, would not have resulted in substantial 11 additional investigation and future remediation? 12 A. I think it could. And as I said, I would hope that it 13 would trigger additional investigation and, if 14 necessary, response. 15 Q. You're familiar -- do you recall the January 27, 2010 16 email from Rob Franks; do you know? 17 A. I have no idea, sir. 18 Q. All right. 19 MARKED FOR IDENTIFICATION 20 DEPOSITION EXHIBIT 7 21 11:29 a.m. 22 BY MR. RODRIGUEZ: 23 Q. Focusing your attention to the bottom half of this 24 email. This was an email from DEQ advising you 25 that -- that the discovery of the TCE on the western	Page 85	1 A. Correct. 2 Q. And saying that there was going to have to be a 3 time -- some time taken here to figure out an 4 appropriate response in dealing with the soils; is 5 that right? 6 MR. BILA: Objection, form. Go ahead. You 7 can still answer. 8 THE WITNESS: I believe the question is as 9 to an appropriate response dealing with the TCE 10 contaminated soil. 11 BY MR. RODRIGUEZ: 12 Q. And -- 13 MR. BILA: Are you done with this 14 Exhibit 6? 15 MR. RODRIGUEZ: Yeah. 16 MARKED FOR IDENTIFICATION 17 DEPOSITION EXHIBIT 8 18 11:33 a.m. 19 MR. BILA: I think we are on 8. 20 MR. RODRIGUEZ: Are we? 21 THE WITNESS: Yes. 22 BY MR. RODRIGUEZ: 23 Q. I'm going to show you what's been marked as Exhibit 8, 24 ask you to take a look at it. 25 A. Okay.	Page 87
1 parcel represented a serious problem; is that right? 2 MR. BILA: Objection, form, go ahead. You 3 can still answer. 4 THE WITNESS: I -- definition of serious 5 problem, they're -- they're simply saying they're 6 conditionally approving part of our proposed work and 7 asking that we not do part of other proposed work. 8 BY MR. RODRIGUEZ: 9 Q. Can you read out loud the first sentence of that 10 paragraph after Soil Sampling and Analytical Results? 11 A. With regard to soil sampling, MDNRE staff have 12 evaluated the analytical results and have concluded 13 that the TCE remaining in the soils on the west side 14 of the former manufacturing plant represents a serious 15 problem. 16 Q. And then -- then skip down to the second paragraph of 17 that section. 18 A. In light of this development, we request that you not 19 move forward with the Clean Soil subtask of Task 3.3 20 Due Care in the approved Act 381 Work Plan, until a 21 final decision is made as to the appropriate response 22 in dealing with the TCE contaminated soils. 23 Q. So -- so this is -- this is DEQ telling you that in 24 his words, not your words, his words, he's calling the 25 results of the testing a serious problem?	Page 86	1 Q. Okay. There are two -- two emails in this exhibit, 2 both from Mr. Franks; isn't that right? 3 A. Yes. 4 Q. So the one I want to focus on is the March 22 email. 5 This email was directed to Mr. Bosgraaf; isn't that 6 right? 7 A. Yes. 8 Q. You were copied on it; is that right? 9 A. Yes. 10 Q. And it advises you that the State is going to require 11 additional soil investigation of the Superfund party; 12 is that right? 13 A. Yes. 14 Q. And it advises you that there is going to be remedial 15 action following -- necessary following that 16 investigation; is that right? 17 A. The appropriate remedial action. 18 Q. Would be necessary. 19 A. Okay. So I -- I mean, you're asking me now to jump 20 into his mind what it means? 21 Q. I'm asking you what the exhibit says. 22 A. It says the remedial action. It doesn't say will be 23 necessary. It says the appropriate remedial actions. 24 Q. Why don't you go ahead and read the sentence. 25 MR. BILA: Which sentence?	Page 88

1 MR. RODRIGUEZ: The one that he just read 2 from. 3 THE WITNESS: Final approval to move 4 forward with construction of a vapor barrier cannot be 5 provided until such time as the soil TCE/PCE 6 investigation has been conducted by Newell Rubbermaid 7 and the -- the appropriate remedial actions have been 8 determined by DNRE. 9 BY MR. RODRIGUEZ: 10 Q. So this was -- this was apprising the developer that 11 there was going to be investigation and remediation 12 necessary before he could move forward with his 13 project; is that right? 14 A. I would say it was advising him that investigation 15 would be required and remedial actions might be 16 necessary. We often investigate sites and determine 17 no additional action is necessary. 18 Q. Is that what he said? 19 A. No. He said the appropriate remedial action. 20 Q. But this did put you on notice that the project was 21 going to be delayed as a result of future -- the need 22 for future testing and remediation, if necessary? 23 A. At least portions of the project, yes. 24 Q. Okay. And were you then familiar with the work plan 25 that was done by URS to do the additional	Page 89 1 neither agree nor disagree with your statement. 2 Q. Okay. The conclusion of the investigation was -- or 3 the culmination would have been December of 2010, I 4 think you said. 5 The next step, did you ever see the notice 6 of additional response activities that was issued by 7 the State? 8 A. I -- I don't know. 9 Q. Let me show it to you. 10 MARKED FOR IDENTIFICATION 11 DEPOSITION EXHIBIT 9 12 11:40 a.m. 13 THE WITNESS: We're done with 8? 14 MR. RODRIGUEZ: Yep. 15 BY MR. RODRIGUEZ: 16 Q. Have you ever seen this letter? 17 A. I may have. I -- I don't recall. 18 Q. What does this letter appear to you to be? 19 A. It's a request for work plan for additional 20 investigation, pilot studies, engineering design, 21 construction implementation, monitoring operation and 22 maintenance, and any other aspect needed to address 23 soil contamination in conformance with industry 24 standard practice and the requirements of the Consent 25 Decree.
Page 90 1 investigation? 2 A. I don't know if we reviewed that document or not. 3 Q. But you know it happened? 4 A. I know the work was eventually conducted and, 5 therefore, I presume under the CERCLA process a work 6 plan had been drafted and approved. 7 Q. Okay. And -- and that work was -- took place over the 8 course of 2010? 9 A. I believe I have in the expert report exhibit for work 10 conducted in 2010, yes. 11 Q. And the results of that testing that was done during 12 the course of 2010, that was the -- the results of 13 that report -- that testing you obviously have seen, 14 because you included it in your expert report; is that 15 right? 16 A. Yes. I believe that summary -- 17 Q. That's the December 2010 report? 18 A. Correct. I believe the summary is all I've seen, but 19 I have seen that summary. 20 Q. And -- and the -- and the testing that was conducted 21 over the course of 2010, that was work that was 22 required by this -- by the DEQ? 23 A. I can't -- as I said, I did not see -- I do not 24 believe I saw the work plan, and those would have been 25 communications primarily between other parties. I	Page 90 1 Q. And he invokes the Consent Decree; is that right? 2 A. With industry standard -- standard industry practice 3 and requirements of the Consent Decree. 4 Q. If you look at page 2, first paragraph under Results 5 of Soil Investigations and Request For Additional 6 Response Activities. 7 A. I believe that's what I just read. 8 Q. Is that what you read? And you begin there with the 9 second sentence of that sentence -- of that section. 10 A. The plan must also contain a schedule. 11 Q. The second sentence of the first paragraph under 12 Results of Soil Investigations -- 13 A. I'm sorry. I was reading from the second paragraph. 14 Studies conducted on both the east and west sides of 15 Prospect Street reveal widespread TCE and/or PCE 16 contamination in excess of the ROD Amendment mandated 17 cleanup standards. 18 Q. And can you continue through the next sentence, 19 please? 20 A. Because of this and because the ROD Amendment requires 21 remediation of these contaminants to levels protective 22 of groundwater, the MDEQ hereby invokes provisions of 23 Section VI, Additional Response Activities, of the 24 October 25, 1996 Consent Decree. (Consent Decree 5:96 25 dash Charlie Victor dash 157 (Frank J. Kelley v Cooper